Supreme Court, U.S.
FILED
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No. 96-1539

In The

Supreme Court of the United States

October Term, 1996

LOON MOUNTAIN RECREATION CORPORATION,

Petitioner,

vs.

ROLAND C. DUBOIS and RESTORE: THE NORTH WOODS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT RESTORE: THE NORTH WOODS

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QUESTIONS PRESENTED

Respondent Restore: The North Woods reiterates the questions presented by Petitioner in their Petition for a Writ of Certiorari.

LIST OF PARTIES

Petitioner:

Loon Mountain Recreation Corporation

Respondents:

Roland C. Dubois

Restore: The North Woods (has no parent companies or any nonwholly owned subsidiaries)

Other Parties:

The National Forest Service of the United States Department of Agriculture

OPINIONS BELOW

The opinion of the court below, *Dubois v. United States Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996) is attached to the Petition for Writ of Certiorari as Appendix A. The modification ordered after Petitions for Rehearing is attached thereto as Appendix B. The opinion of the United States District Court for the District of New Hampshire, *Dubois v. United States Department of Agriculture,* Civil No. 95-50-B (D.N.H. November 2, 1995) is attached thereto as Appendix C.

STATUTES INVOLVED

Excerpts of the relevant statutes are attached to the Petition for Writ of Certiorari as Appendix D.

REGULATIONS INVOLVED

Excerpts of the relevant regulations are attached to the Petition for Writ of Certiorari as Appendix E.

STATEMENT OF JURISDICTION

Respondent Restore: The North Woods adopts the jurisdictional statement found in the Petition for Writ of Certiorari at p. 1.

STATEMENT OF THE CASE

Respondent Restore: The North Woods adopts the statement of the case in the opinion of the First Circuit Court of Appeals regarding the district court proceedings. Petition for Writ of Certiorari, p. 9a, *et seq.*

In correction to the appellate case as stated at page 3 of the Petition for Writ of Certiorari, on December 19, 1996, the United

States Court of Appeals for the First Circuit partially reversed the district court's dismissal, holding that multiple deficiencies in the National Environmental Policy Act environmental review process required preparation of a new environmental impact statement, and that a Clean Water Act (National Pollutant Discharge Elimination System) permit was required for certain discharges from Loon's snowmaking system into Loon Pond. Appendix A to the Petition for Writ of Certiorari.

STATEMENT OF FACTS

Respondent Restore: The North Woods adopts the statement of facts in the opinion of the First Circuit Court of Appeals. Petition for Writ of Certiorari, p. 3a, *et seq.*

REASONS FOR DENYING THE WRIT

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE FIRST QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The question of whether withdrawal and return of water to the same body of water of the United States without addition of any pollutants constitutes a point source discharge requiring a permit under the Clean Water Act was not explicitly raised below, nor has it been addressed in the court of appeals decision, and thus it is not ripe for review. Factual analysis below, as per the First Circuit opinion found at the Petition for Writ of Certiorari at pp. 46a to 53a, was of the transfer of water from one body, the East Branch of the Pemigewasset, to another, Loon Pond. All "parties agree that . . . East Branch water discharged from Loon Corp.'s snowmaking pipes into Loon Pond is a pollutant within the meaning of the CWA . . .". Appendix A to the Petition for Certiorari, p. 46a.

Additionally there is an unresolved factual dispute regarding whether or not pollutants are added by the snowmaking system, again rendering the question not ripe for review. *See* Appendix A to the Petition for Certiorari, pp. 47a n. 29 and 48a n. 30.

Accordingly, the Petition for Writ of Certiorari regarding the first Question Presented should be denied.

II.

THE SECOND QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI IS NOT RIPE FOR REVIEW.

The question of whether transfer of water without addition of any pollutants from one water of the United States to another constitutes a point source discharge requiring a permit under the Clean Water Act is not ripe for review, because, as the record reflects, an unresolved factual dispute remains as to whether pollutants, particularly oil and grease, are added by the snowmaking system. *See* Appendix A to the Petition for Writ of Certiorari, p. 47a n. 29 and 48a n. 30.

Accordingly, the Petition for Writ of Certiorari regarding the second Question Presented should be denied.

III.

THE THIRD QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI IS NOT PROPERLY BEFORE THE COURT AS IT WAS NEVER RAISED BELOW PRIOR TO THE PETITIONER'S MOTION FOR REHEARING.

The question of whether NEPA requires review of additional mitigation alternatives when the agency has determined that the planned mitigation completely ameliorates any consequential environmental harm was never raised below until the Petitioner's Motion for Rehearing before the First Circuit Court of Appeals. Having not been considered on its merits, the issue is not properly before this Court.

Furthermore, this question as presented is a mischaracterization of the facts. The First Circuit Court of Appeals found that constructed snowmaking ponds were required to be considered as a reasonable project alternative, not a mitigation measure. *See* Appendix A to the Petition for Certiorari, pp. 27a to 31a. Additionally, there was never any determination by the United States Forest Service that the selected alternative, or any of the considered alternatives, would "completely ameliorate any consequential environmental harm."

Accordingly, the Petition for Writ of Certiorari regarding the third Question Presented should be denied.

IV.

THE FOURTH QUESTION PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI IS NOT FACTUALLY SUPPORTED BY THE DECISION OR RECORD BELOW.

The question of whether, when all of the components of a selected alternative under NEPA have been fully analyzed and considered, is separate consideration of such alternative *sub hoc nomine* required, is not properly before this Court because it is not factually supported by the record below. Petitioner presents a severe mischaracterization of the facts of the selected Alternative 6. As the First Circuit Court of Appeals found, Alternative 6 was not "within the spectrum of alternatives" previously considered by the Forest Service. *See* Appendix A to the Petition for Writ of Certiorari, p. 37a to 39a.

Accordingly, the Petition for Writ of Certiorari regarding the fourth Question Presented should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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